HONORABLE CHIEF JUDGE MICHAEL CHAIT 1 **KELSEY ENDRES** THOMAS O. RICE HAYLEY VENTOZA MONTGOMERY SCARP & CHAIT PLLC 1218 THIRD AVENUE, SUITE 2500 SEATTLE, WA 98101 3 (206) 625-1801 4 5 6 UNITED STATES DISTRICT COURT EASTERN DISTRICT OF WASHINGTON 7 LAWRENCE DARREN MODLER, No. 2:18-CV-257-TOR 8 Plaintiff, **BNSF'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S** VS. 9 **RESPONSE TO BNSF'S MOTION** BNSF RAILWAY CO., FOR SUMMARY JUDGMENT 10 Defendant. NOTE ON MOTION CALENDAR: 11 August 27, 2019 Without oral argument 12 13 14 Pursuant to Federal Rule of Civil Procedure 56(c)(2), BNSF files the 15 following objections to evidence filed in support of Plaintiff's Response to BNSF's 16 Motion for Summary Judgment (ECF No. 45) and Plaintiff's Response to BNSF's 17 Statement of Material Facts (ECF No. 43). 18 19 20 MONTGOMERY SCARP & CHAIT PLLC BNSF'S EVIDENTIARY OBJECTIONS TO 1218 Third Avenue, Suite 2500 PLAINTIFF'S RESPONSE TO BNSF'S Seattle, Washington 98101 21 MOTION FOR SUMMARY JUDGMENT - 1 Telephone (206) 625-1801 No. 2:18-cv-257-TOR Facsimile (206) 625-1807

EVIDENTIARY OBJECTIONS

2	Material objected to	Ground(s) for objection	Ruling
3	1. All exhibits "attached" to Plaintiff's Response to	Plaintiff did not include a declaration to authenticate such "attached"	□ Sustained
4	BNSF's Motion for	exhibits, nor establish that they are	
5	Summary Judgment (ECF No. 45) and	self-authenticating. Fed. R. Evid. 602, 901(a); Fed. R. Civ. Proc. 56(c)(4);	
6	Plaintiff's Response to BNSF's Statement of	Kim v. Boeing Co., No. C10- 1850RSM, 2011 WL 4437086, at *1	
7	Material Facts (ECF No. 43).	(W.D. Wash. Sept. 23, 2011), aff'd, 487 F. App'x 356 (9th Cir. 2012). As	
8		such, all should be ignored, and any reference to such evidence in plaintiff's opposition should be	
9		stricken. <i>Howell v. Swedish Med. Ctr.</i> , No. C04-1329RSM, 2005 WL	
10		2455020, at *1 (W.D. Wash. Oct. 4, 2005) (where plaintiff failed to	
11		properly file declaration, "declaration and attached exhibits accordingly	
12		cannot be considered by the Court.")	
13	2. The inclusion of full, undesignated, deposition	Without explanation, plaintiff includes the full transcripts of each deposition	☐ Sustained
14	transcripts (ECF Nos. 43-	taken in this case (as well as a number	
15	1 through 43-12, 43-15 through 43-20, 43-22,	of irrelevant transcripts from other cases), regardless of whether any	
16	43-23)	specific section applies, and without pointing the Court to any sections	
17		cited. These exhibits should be stricken for failure to abide by the	
18		Court's Jury Trial Scheduling Order which provides:	
19		When a party relies on	
20	BNSF'S EVIDENTIARY OBJ	deposition testimony to FCTIONS TO MONTGOMERY SCARP	& CHAIT PLLC

BNSF'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S RESPONSE TO BNSF'S MOTION FOR SUMMARY JUDGMENT - 2 No. 2:18-cv-257-TOR

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MONTGOMERY SCARP & CHAIT PLLC 1218 Third Avenue, Suite 2500 Seattle, Washington 98101 Telephone (206) 625-1801 Facsimile (206) 625-1807

1	Material objected to	Ground(s) for objection	Ruling
2		support a position it takes in	
		support or opposition to an	
3		issue, that party shall provide	
		the Court with the pertinent	
4		excerpts of the deposition	
		testimony relied upon and	
5		shall cite to page and line	
		numbers of the deposition it	
6		believes supports its position.	
_		See generally LCivR 56(c).	
7		Submission of the entire	
		deposition and/or failure to	
8		cite to specific portions of the	
		deposition may result in the	
9		submission being stricken	
10		from the record. See Orr v.	
10		Bank of America, 285 F.3d	
11		764, 774-75 (9th Cir. 2002).	
11		ECF No. 13 at 6:17-7:4 (emphasis in	
12		original). Accordingly, the above-	
_		referenced exhibits, and any reference	
13		to them in the briefing, should be	
		stricken.	
14			
	3. Ex. A, deposition of	Plaintiff seeks to introduce the entirety	□ C
15	Darron Boltin in	of the deposition testimony of a BNSF	☐ Sustained
	Fresquez v. BNSF, Case	employee, from an entirely different	
16	No. 1:17-cv-008844 (D.	case, in a different state, involving	
	Col.), in its entirety.	none of the individuals involved in this	
17		case. Mr. Boltin has never been	
		identified in discovery responses, or	
18		otherwise disclosed as a witness in this	
		case. There is no relevance to such	
19		information on its face, and the	
20		attachment of the transcript violates	
20	BNSF'S EVIDENTIARY OBJECTIONS TO MONTGOMERY SCARP & CHAIT PLLO 1218 Third Avenue Suite 2500		

BNSF'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S RESPONSE TO BNSF'S MOTION FOR SUMMARY JUDGMENT - 3 No. 2:18-cv-257-TOR

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MONTGOMERY SCARP & CHAIT PLLC 1218 Third Avenue, Suite 2500

Seattle, Washington 98101 Telephone (206) 625-1801 Facsimile (206) 625-1807

1	Material objected to	Ground(s) for objection	Ruling
2		the Court's Jury Trial Scheduling	
3		Order (ECF No. 13 at 6:17-7:4).	
4		Moreover, plaintiff proffers this	
4		testimony to claim that the investigation procedures bargained for	
5		as part of the Collective Bargaining Agreement between BNSF and	
6		members of plaintiff's union are	
7		"unfair." Such perceived "unfairness" of the bargained-for agreement is	
8		entirely irrelevant to the issues before this Court. <i>See</i> BNSF's Motion in	
		Limine Nos. 35 (ECF No. 53 at 43:8-	
9		44:15).	
10		Moreover, this individual was not identified in plaintiff's initial	
11		disclosures and the testimony can be	
12		struck on that basis, too. Fed. R. Civ. Proc. 37(c)(1).	
13	4. Ex. H, deposition of	Plaintiff seeks to introduce the entirety	
	BNSF (Eric Weber) in	of the deposition transcript of a six	☐ Sustained☐ Overruled☐
14	Koziara v. BNSF, Case No. 13-cv-00834 (W.D.	year old corporate deposition, from an entirely different case, in a different	
15	Wis.), in its entirety.	state, involving none of the individuals involved in this case. Plaintiff does not	
16		even cite this deposition in his	
17		response papers. There is no relevance to such information on its face, and the	
18		attachment of the transcript violates	
		the Court's Jury Trial Scheduling Order (ECF No. 13 at 6:17-7:4).	
19		Moreover, this individual was not identified in discovery or plaintiff's	
20	BNSF'S EVIDENTIARY OBJ	ECTIONS TO MONTGOMERY SCARP	

BNSF'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S RESPONSE TO BNSF'S MOTION FOR SUMMARY JUDGMENT - 4 No. 2:18-cv-257-TOR

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Material objected to	Ground(s) for objection	Ruling
	initial disclosures and the testimony can be struck on that basis, too. Fed. R. Civ. Proc. 37(c)(1).	
5. Ex. I, deposition of PNSE (Cros Veenty) in	Plaintiff seeks to introduce the entirety	☐ Sustained
BNSF (Greg Koontz) in Dickens v. BNSF, OSHA Office of Administrative	of the deposition transcript of a 2017 corporate deposition, from an entirely different state	
Judges, Case No. 2016-	different case, in a different state, involving none of the individuals involved in this case. Plaintiff does not	
FRS-0065, in its entirety.	cite to any specific portion of his	
	deposition in his response papers. There is no relevance to such information on its face, and the	
	information on its face, and the attachment of the transcript violates	
	the Court's Jury Trial Scheduling Order (ECF No. 13 at 6:17-7:4).	
	Moreover, this individual was not identified in discovery or plaintiff's	
	initial disclosures and the testimony can be struck on that basis, too. Fed. R.	
	Civ. Proc. 37(c)(1).	
6. Ex. J, deposition of Michael Paz in <i>Fresquez</i>	Plaintiff seeks to introduce the entirety of the deposition transcript of an	☐ Sustained☐ Overruled☐
v. <i>BNSF</i> , Case No. 1:17-cv-008844 (D. Col.), in	unrelated witness, from an entirely different case, in a different state,	
its entirety.	involving none of the individuals involved in this case. There is no	
	relevance to such information on its face, and the attachment of the	
	transcript violates the Court's Jury Trial Scheduling Order (ECF No. 13 at	
	6:17-7:4).	
BNSF'S EVIDENTIARY OBJ	Moreover, neither this individual, nor MONTGOMERY SCARP	& CHAIT PLLC

BNSF'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S RESPONSE TO BNSF'S MOTION FOR SUMMARY JUDGMENT - 5 No. 2:18-cv-257-TOR

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ONTGOMERY SCARP & CHAIT PLLC 1218 Third Avenue, Suite 2500 Seattle, Washington 98101 Telephone (206) 625-1801 Facsimile (206) 625-1807

1	Material objected to	Ground(s) for objection	Ruling
2		this transcript, was identified in discovery or in plaintiff's initial	
3 4		disclosures and the testimony can be struck on that basis, too. Fed. R. Civ. Proc. 37(c)(1).	
5	7. Ex. K, declaration of Lawrence Mann	Plaintiff seeks to introduce the entirety of a declaration of an undisclosed	☐ Sustained
6	submitted in <i>Fresquez v</i> . <i>BNSF</i> , Case No. 1:17-cv-	expert that his counsel filed in an entirely different case, in a different	
7	008844 (D. Col.), in its entirety.	state, involving none of the individuals involved in this case.	
8		The declaration valetce calchy to the	
9		The declaration relates solely to the purported legislative history behind amendments to the FRSA that have no	
10		bearing on resolution of the issues on this motion. See, e.g., BNSF's Motion	
11		in Limine No. 8, ECF No. 53 at 15:7-16:13.	
12		Moreover, neither this individual, nor	
13		this declaration were identified in discovery or in plaintiff's initial	
14		disclosures and the testimony can be struck on that basis, too. Fed. R. Civ.	
15		Proc. 37(c)(1).	
16	8. Ex. Q, deposition of Stephanie Detlefson in	Plaintiff seeks to introduce the entirety of the deposition transcript of an	☐ Sustained
17	Fresquez v. BNSF, Case No. 1:17-cv-008844 (D.	unrelated witness, from an entirely different case, in a different state,	□ Overruled
18	Col.), in its entirety.	involving none of the individuals	
19		involved in this case. There is no relevance to such information on its	
20		face, and the attachment of the	
20 21	BNSF'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S RESPONSE TO BNSF'S MOTION FOR SUMMARY JUDGMENT - 6 MONTGOMERY SCARP & CHAIT P 1218 Third Avenue, Suite 2500 Seattle, Washington 98101 Telephone (206) 625-1801		
	No. 2:18-cv-257-TOR	Facsimile (206) 6	

1	Material objected to	Ground(s) for objection	Ruling
2		transcript violates the Court's Jury Trial Scheduling Order (ECF No. 13 at	
3		6:17-7:4).	
4		Moreover, neither this individual, nor this transcript, was identified in	
5		discovery or in plaintiff's initial disclosures and the testimony can be	
6		struck on that basis, too. Fed. R. Civ. Proc. 37(c)(1).	
7	9. Exhibit U, Plaintiff's	Plaintiff's use of his own interview is	☐ Sustained
8	September 12, 2017 interview with OSHA.	impermissible hearsay. Fed. R. Evid. 802. While BNSF may use the	□ Overruled
9		interview under Federal Rule of Evidence Procedure 801(d)(2),	
10		plaintiff's use of it is not permitted.	
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20	BNSF'S EVIDENTIARY OBJECTIONS TO PLAINTHEE'S DESPONSE TO PAISE'S 1218 Third Avenue,		
21	PLAINTIFF'S RESPONSE TO BNSF'S MOTION FOR SUMMARY JUDGMENT - 7 No. 2:18-cv-257-TOR Seattle, Washingt Telephone (206) Facsimile (206)		on 98101 525-1801

1 **CERTIFICATE OF SERVICE** 2 I am over the age of 18 and not a party to this action. I am the assistant to an attorney with Montgomery Scarp & Chait PLLC, whose address is 1218 Third 3 Avenue, Suite 2500, Seattle, Washington, 98101. 4 I hereby certify that a true and complete copy of BNSF'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S RESPONSE TO BNSF'S MOTION FOR 5 SUMMARY JUDGMENT has been filed with the United State District Court via 6 ECF system, which gives automatic notification to the following interested parties: 7 Joseph A. Grube Nicholas D. Thompson The Moody Law Firm Karen Orehoski 8 500 Crawford Street, Suite 200 Breneman Grube Orehoski, PLLC Portsmouth, VA 23704 9 1200 Fifth Avenue, Suite 625 Seattle, WA 98101 10 Attorneys for Plaintiff Attorneys for Plaintiff-Pro Hac Vice 11 I declare under penalty under the laws of the United States of America that the foregoing information is true and correct. 12 DATED this 12th day of August, at Seattle, Washington. 13 14 15 s/ Katherine Eiler Katherine Eiler, Paralegal 16 17 18 19 20 MONTGOMERY SCARP & CHAIT PLLC BNSF'S EVIDENTIARY OBJECTIONS TO 1218 Third Avenue, Suite 2500 PLAINTIFF'S RESPONSE TO BNSF'S Seattle, Washington 98101 21 **MOTION FOR SUMMARY JUDGMENT - 8** Telephone (206) 625-1801

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